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Supreme Court of the United States

OCTOBER TERM, 1959

No. 579

ALLENDALE CONGREGATION OF JEHOVAH'S WITNESSES,

Appellant,

vs.

EDWIN W. GROSMAN, BOROUGH OF ALLENDALE BOARD OF ADJUSTMENT and BOROUGH OF ALLENDALE,

Appellees.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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MAY IT PLEASE THE COURT:

It is stated by appellees that the jurisdictional statement of appellant does not present to this Court a substantial question as to the constitutionality of the Allendale Zoning Ordinance requiring off-street parking for places of assembly in the Borough of Allendale. The position taken by the appellees on the validity of the ordinance in question is in

conflict with *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 415-416 (1922). This decision by this Court was relied upon by the Supreme Court of Colorado in *City and County of Denver* v. *Denver Buick, Inc.*, No. 18699, December 5, 1959, — P. 2d —, where the court said:

"Questions to be Determined

"First. *Where a zoning ordinance of a municipality contains provisions which purport to require the installation of off-street parking facilities by the owner of land as a condition which must be fulfilled before such owner will be permitted to make use of his land for business purposes authorized in the district within which the land is located; are such provisions unconstitutional when tested by the due process clause of the state and federal constitutions and by Article II, Section 15, of the State Constitution which provides, inter alia, that 'private property shall not be taken or damaged, for public or private use, without just compensation'?*

"We answer this question in the affirmative, and hold that such provisions are repugnant to each of said constitutional guarantees. We think it essential to again state some basic principles of constitutional law to which we are indebted as a nation of freedom loving people, and to which we must steadfastly adhere if individual freedoms and liberties are to survive.

. . . . . .

It is the unquestioned duty and responsibility of the judicial branch of government, through the decision of controversies which come before it, to safeguard and maintain the constitutional provisions which guarantee the maximum free and unrestricted use of property by the citizen, and to strike down those enactments which unreasonably and unnecessarily fasten upon him new restraints upon freedom of action in the use and enjoyment thereof.

. . . . . .

"The legal effect of the argument of the City is that it has a problem of concentration of traffic in the streets and that accordingly there is a right, under the zoning ordinance, to appropriate for off-street parking substantial portions of property of citizens desiring to use that property for a legitimate purpose, and to prohibit the use of that property for any purpose until its owners devote a substantial portion thereof to parking; and this despite the fact that in District B-5 which is in all respects similar to B-6 in general usage, no such requirement exists. No such power exists in the city thus to take private property for a public purpose without compensation to the owner for the taking. It would be quite as proper to argue that the city had the right, under the guise of 'zoning' to require dedication of private property for the street itself, if it were considered that a given street was generally inadequate to carry the traffic; and to prohibit the use of property for any legitimate purpose until such dedication was made. If it be true that a traffic problem exists, it cannot be legally solved by confiscation of private property without compensation, under a pretense of 'zoning.'

"The alert business man as a matter of voluntary action fully realizes the advantages which are to be gained by affording parking facilities to his customers. However, he cannot be compelled to do so under penalty of forfeiting the right to make a beneficial use of his property. The city has ample power to control the 'congestion of traffic' by adoption of regulations adequate for the purpose, which are directly related to that problem. Compulsory, involuntary off-street parking maintained at the expense of a property owner as a price tag or tribute for the exercise of the constitutional right to do business, is 'completely out of harmony with the American constitutional concept of fundamental freedoms and liberties.' It has no definite or substantial tendency to promote or protect those objectives which form the basis of police power."

See also the concurring opinion of Mr. Justice Frantz, where it is stated:

"Justification of this zoning ordinance in the name of progress, and on the theory that the Constitutions, Federal and state, are flexible enough to sustain it, is not in my opinion warranted. All too frequently acceptance of legislation is urged because it represents progress, and because the flexibility of both Constitutions allegedly has come to mean documents of boundless accommodation, Protean in their adjustments. Beguiling indeed are these notions, and hence their advancement as arguments for a proposition should be scrutinized and analyzed with care."

Mr. Justice Frantz in his concurring opinion cites *Greenberg* v. *City of New Rochelle*, 129 N. Y. S. 2d 691, affm'd 134 N. Y. S. 2d 593, appeal dismissed 308 N. Y. 736, 124 N. E. 2d 716; *Property Owners Ass'n, etc.* v. *Board of Zoning Appeals*, 123 N. Y. S. 2d 716. Concerning the latter case the justice quoted from the syllabus, as follows: "Great increase in traffic and parking on village streets, if a college were granted permission to erect seating stands adjacent to its athletic field in village, were probleins for police, not village zoning authorities."

It is respectfully submitted that the decision of the court below is in direct conflict with *City and County of Denver* v. *Denver Buick, Inc.*, No. 18699, December 5, 1959, — P. 2d —; and *Board of Zoning Appeals* v. *Decatur, Indiana Company of Jehovah's Witnesses*, 233 Ind. 83, 117 N. E. 2d 115 (1954). This case was referred to in the jurisdictional statement filed in this case at pages 10, 13. This conflict of decision warrants this Court in noting jurisdiction in this case. (Stern and Gressman, *Supreme Court Practice*, page 141, Washington, D.C., Bureau of National Affairs, Inc., 1954) This Court should also note jurisdiction because of the conflict in principle between the decision of the court below and *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 415-416 (1922).

CONCLUSION

WHEREFORE, for the reasons stated in the jurisdictional statement and in this brief opposing motion to dismiss, this Court should note jurisdiction.

Respectfully submitted,

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